NOTES

WASHINGTON NOTES

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A far-reaching decision was handed down on March 11 by the Supreme Court of the United States in the case of *Sidney Henry* v. *The A. B. Dick Company* (Supreme Court of the U.S. No. 20, October Term, 1911). It involved the question whether the proprietor of a patented article has the right, in selling his production, to require an agreement on the part of the purchaser that the latter will buy supplies for use in connection with the article from the original seller; and whether, having made such an agreement, he can enforce its terms. This brings to a head the question whether a patent is a monopoly of use or merely of the right of sale, the latter having been the prevailing view heretofore, notwithstanding the efforts of many patentees to secure the application of the notion of monopoly of use. The view of the court is sustained only by a minority of four judges, Chief Justice White and two others dissenting, while one justice did not sit in the case, and one place is vacant. This makes the situation exceedingly unsatisfactory, and has confirmed many legislators in the demand for a better legal definition of the patent, in order that the decision of the court may either be unequivocally sustained by law or may be rendered void, as being out of harmony with the statutes. For a good while past, the attitude of Congress with respect to the patent question has been one of hesitation. Legislation on this very point has been repeatedly demanded, and there has also been earnest request for the creation of a court of patent appeals, which should be more competent to deal with the subject than the Supreme Court and which should consist of technically informed men able to give an expert verdict with reference to the matters brought before them. Demand has also been made for legislation requiring the working of patents or permitting those who desire to use them to do so upon payment of a royalty to be fixed by the government in the event that patentees

were not disposed to apply the inventions to which they held the right under the terms of the law. It is probable that these and a number of other points will now be sharply raised in Congress as a result of the dissatisfaction produced by the opinion of the Supreme Court in the Dick case. The majority view of the present status is strikingly expressed as follows:

The conclusion we reach is that there is no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use of the patented article purchased from the patentee. If the violation of the one kind is an infringement, the other is also. That a violation of any such restriction annexed to a sale by one with notice constitutes an infringing use has been decided by a great majority of the circuit courts and circuit courts of appeal, and has come to be a well-recognized principle in the patent law, in accordance with which vast transactions in respect to patented articles have been conducted. But it is now said that the numerous decisions by the lower courts have been erroneous in respect to the proper construction of the limit of the monopoly conferred by a patent, and that they should now be overruled. To these courts has been committed the duty of interpreting and administering the patent law. There is no power in this court to review their judgments, except upon a writ of certiorari, or to direct their decisions, save through a certified interrogatory for direction upon a question of law. This power to review by certiorari, is one which has been seldom exercised in patent cases. A line of decisions, which has come to be something like a rule of property, under which large businesses have been conducted, should at least not be overruled except upon reasons so clear as to make any other construction of the patent law inadmissible.

Chief Justice White for the minority states:

The ruling now made in effect is that the patentee has the power, by contract, to extend his patent rights so as to bring within the claims of his patent things which are not embraced therein, thus virtually legislating by causing the patent laws to cover subjects to which without the exercise of the right of contract they could not reach, the result being not only to multiply monopolies at the will of an interested party, but also to destroy the jurisdiction of the state courts over subjects which from the beginning have been within their authority.

The vast extent to which the results just stated may be carried will be at once apparent by considering the facts of this case and bearing in mind that this is not the suit of a patentee against one with whom he has contracted to enforce as against such person an act done in violation of a contract as an infringement, but it is against a third person who happened to deal in an ordinary commodity of general use with a person with whom the patentee had contracted. And this statement shows that the effect of the ruling is to make

the virtual legislative authority of the owner of a patented machine extend to every human being in society without reference to their privity to any contract existing between the patentee and the one to whom he has sold the patented machine.

The second step in the work of the Ways and Means Committee in this year's attempt to revise the tariff was taken on February 16 when the committee reported a new measure, subsequently passed by the House, for the revision of the chemical schedule in the tariff act. This bill and the report accompanying it (Report No. 326, House of Representatives, 62d Congress, 2d session) constitutes one of the most interesting documents relating to the revision of the tariff that have been published during the present Congress. The new chemical bill itself is important because it furnishes the first proposal since 1883 for a general reconstruction of the chemical schedule. In that year, the chemical schedule was given a definite status apart from others and it has retained its original form substantially intact, notwithstanding the complete revolutionizing of the industry during those years. Now an attempt is made to rearrange the paragraphs and to rename the commodities included in the several paragraphs in such a way as to conform to current industrial usage. Moreover, the bill greatly alters the rates of the existing tariff, and alters them in such a way as to effect a result quite at variance with the policy of the Democratic party as set forth in the other measures it has thus far offered. In these other measures, ad valorem have been substituted for specific duties, but in the chemical bill the specific duty plan is retained to a very considerable extent. This is done because of the difficulty of testing the more valuable chemicals and drugs for purity and content at the time of their importation. Owing to the difficulty of making such tests, ad valorem duties encourage the presentation of valuable grades of the imported articles under the guise of cheaper grades, thereby depriving the Treasury of much revenue. Hence in the new bill, while ad valorem duties are used so far as deemed possible, the chief reliance is on the other method of imposing the tariff rates. One interesting feature of the report on the bill is the discussion it offers concerning the patent situation. In this is furnished some material never before made public concerning the number of patents affecting the chemical industry which are held abroad. It is shown that this number is very large and that in consequence the question of tariff duties on those particular items is not of much importance, the foreign manufacturer being in position to control the American market through his enjoyment of our patent rights, although not compelled to manufacture

here. The report states that between 1900 and 1910, 4,068 patents relating to the chemical and allied industries were issued in the United States and that of these at least 3,500 were applicable to chemicals as such in the exclusive sense of the term. About 38 per cent of the 4,068 patents were granted to Americans while about 62 per cent, or 2,500, were granted to foreigners.

> A patent is essentially a monopoly [says the committee], and the fact that the United States does not specify compulsory working of patents but allows the production of the article wherever desired, permitting importation subject only to the tariff, means that, under present conditions, practical control of a considerable portion of our market for chemicals is accorded to foreign investors and producers entirely independent of costs of production. Conversely, American inventors who are given a monopoly of specified processes through patents are protected against the competition of foreigners in so far as they are able to maintain their patent rights here and abroad. For these, as well as for other reasons, the chemical manufacturing industry is not now on a like competitive basis to that found in other lines of manufacture.

As for protection, the committee believe that the industry is very closely organized and that prices are by no means established on a competitive basis in it. The evidence is, therefore, considered to warrant the making of a materially lower rate of protection. This, however, has been obtained, not by a great reduction in rates, but by increasing the tariff on raw materials while somewhat cutting it upon manufactured products.

The latest phase of Democratic revenue policy is, however, seen in the presentation and the passage by the House of a measure restoring the income tax plan of eighteen years ago (H.R. 21214). Accompanying this is a "free sugar bill" (H.R. 21213), the income tax bill being intended to provide the revenue lost through the removal of tariff duties on sugar. The income tax or excise measure assumes a new form intended to overcome the unconstitutionality recognized by the Supreme Court in the case of the Wilson provision on the same subject. Although, in every essential particular, the new bill is similar to the former effort of the Democrats, it is presented in the guise of an excise tax because of the action of the Supreme Court in upholding the corporation excise tax last year. An excise "with respect to the privilege of doing business by persons" is therefore the new phase of the proposal. An exemption of incomes of $5,000 and less is provided for, while incomes derived from the securities of corporations already subject to the corporation tax, whether less or more than $5,000, are also exempt. A variety of exemptions to cover payments of taxation to municipalities, states, etc., is

likewise made and in this way the basis for the tax is very greatly cut down. Moreover the old principle of self-assessment is retained, except in regard to government salaries and in one or two other cases. The bill is therefore crudely drawn. In advocating it the committee offered the following statement of the legal aspects of the case:

The constitutionality of the proposed tax therefore becomes apparent if these two propositions can be sustained:

1. The proposed tax is not a direct tax upon the property, real or personal, of the copartnerships or individuals, but a special excise upon the carrying on or doing business by such copartnerships or individuals, and it, therefore, needs no apportionment among the states according to population as required by the Constitution with reference to direct taxes.

2. The proposed tax is uniform throughout the United States.

If it be true that the tax is an excise, its indirect character is at once established. (*Pacific Insurance Co.* v. *Soule*, 7 Wall., 433; *Springer* v. *United States*, 102 U.S., 585; *Spreckels Sugar Refining Co.* v. *McClain*, 192 U.S., 397.)

While it has been in the past a subject for considerable argument, it is now well settled that the terms "duties, imposts, and excises" must be treated as embracing all the indirect forms of taxation contemplated by the Constitution. Mr. Chief Justice Fuller stated the conclusion from all the cases when, in the Pollock case (157 U.S., 557), he said: "Although there have been from time to time intimations that there might be some case which was not a direct tax, nor included under the words duties, imposts, and excises, such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

The proposed tax is an excise because:

a) The tax is legislatively intended as an excise, as shown by the plain language of the bill.

b) The subject of the tax is the conduct or transaction of business which, according to a uniform line of decisions by the Supreme Court of the United States, is a proper subject of excise tax.

c) The fact that the tax is to be measured by the net income of the taxable person or firm does not change its real character.

There is no pretense of any possibility of detailed accurate estimates of yield, but the committee simply says:

There are no statistics as to the number of individuals, firms, and copartnerships in the United States that would be subject to the taxes proposed by H.R. 21214. The estimates of revenue prepared for the committee vary greatly, and after carefully considering them the committee feels that $60,000,000 for a 12-month period under H.R. 21214 is conservative. This estimate of $60,000,000 is the result of a careful study of the figures representing the total

wealth of the country, together with those of the corporate wealth under the corporation-tax law of 1909 and the revenue derived therefrom in 1911. Due consideration has also been taken in the estimate of the results and the experience of other countries in raising revenue from similar taxes.

In reply the Republican minority members have filed a report in which they assert that the tax will not yield more than $20,000,000 and allege its unconstitutionality. Although the minority pretend to be able to offer some estimates of yield, the following grotesque figures obtained from the Treasury Department show the nature of the task they have had to perform.

ESTIMATE NO. 1

Class	Estimated Number of Individuals	Amount of Income Over	Estimated Total of Income	Estimated Tax
1.....	20	$10,000,000	$200,000,000	$2,000,000
2.....	100	1,000,000	$200,000,000	2,000,000
3.....	500	500,000	300,000,000	3,000,000
4.....	2,000	100,000	400,000,000	4,000,000
5.....	10,000	50,000	600,000,000	6,000,000
6.....	20,000	20,000	*350,000,000	3,500,000
7.....	50,000	10,000	*250,000,000	2,500,000
8.....	100,000	7,500	*250,000,000	2,500,000
9.....	100,000	5,000	*100,000,000	1,000,000
	282,620	.....	2,650,000,000	26,500,000

ESTIMATE NO. 2

1.....	10	$10,000,000	$120,000,000	$1,200,000
2.....	50	1,000,000	100,000,000	$1,000,000
3.....	300	500,000	200,000,000	2,000,000
4.....	2,000	100,000	300,000,000	3,000,000
5.....	10,000	50,000	600,000,000	6,000,000
6.....	25,000	20,000	*400,000,000	4,000,000
7.....	75,000	10,000	*400,000,000	4,000,000
8.....	100,000	7,500	*250,000,000	2,500,000
9.....	200,000	5,000	*200,000,000	2,000,000
	412,000	.....	2,570,000,000	25,700,000

* Statutory deduction of $5,000 made in each case.

The report of President Taft's postal commission sent to Congress on February 22 (H.R. Doc. 559, 62d Congress, 2d session) gives the results of a lengthy study of the postal problem, prosecuted as the result of the appointment of this commission to settle the bitter controversy as to second-class rates which broke out a year ago. The report of the

commission, although technically sustaining the demands of the administration for the raising of the second-class rate from one to two cents, is disappointing and inconclusive. This character of the report is seen particularly with reference to the findings on cost of transporting mails in the post-office department, the very branch of the investigation which it had been desired to have most accurately conducted. The commission thinks that, although it has been over the ground most carefully, the evidence submitted does not justify a finding of the total cost of transporting and handling the different classes of mail. Only an approximate estimate of cost of the transportation of different classes of second-class mail can be made, and even this is unsatisfactory for a number of reasons. As for the different sorts of newspapers and periodicals, no evidence whatever was found to show the cost of transportation. A striking feature of the finding is that the express companies are able to underbid the government in many branches of postal business. This is true of the transportation of newspapers and magazines on short hauls. The long hauls, which are more costly, are the ones that are left to be cared for by the government, while the express companies are able to take the cream of the business at lower rates in competition with the regular mail service. As the commission expresses it, "competition in the more profitable part of the business is unavoidable, unless the second-class privilege were restricted to those publishers who send through the post-office all copies of their publications requiring railroad transportation. The commission does not recommend an effort to monopolize the carriage of newspapers and periodicals." The establishment of rates commensurate with estimated costs would, it is admitted, dislocate the service and produce such entirely new conditions that a new computation of cost would be necessary. For this reason the commission abandons as wholly impracticable the attempt to report with any satisfactory approach to accuracy what charge for the different classes of second-class mail would meet and reimburse the government for the expense which it incurs in their transportation and handling. There is no probability that the conclusions of the commission will be put into any form of law at this session of Congress, or perhaps in the near future although the report will stand as the first careful attempt that has been made to secure real facts regarding the working of the post-office. The report has undoubtedly emphasized the wholly unsatisfatory and inadequate system of accounting which is maintained in the post-office department and one good result of it may be to bring about a reorganization of accounting, with a view to getting at some actual facts concerning

the transportation of mail. In the long run it is likely that an effort will be made to adjust all classes of postal charge more closely to the cost-of-service principle when the data for making that adjustment have been obtained. Meanwhile the lack of such data is admitted by the Commission although denied by the Postmaster-General and will prove a practically insuperable obstacle to legislation.

An important forward step in connection with banking and currency legislation has been taken by the Banking and Currency Committee of the House of Representatives in deciding that the committee, which was sometime ago ordered to begin a "money trust" investigation, shall be divided into two subcommittees for the prosecution of the work. One of these subcommittees is to deal with the speculative and stock-market phases of the subject, while the other is to devote itself to the question of legislation. The chairman of the legislative subcommittee is Hon. Carter Glass of Virginia, who has for many years been a member of the Banking and Currency Committee. Thus is brought about an actual investigation into the present status of the law and the need for further legislation, although it had not been expected that any distinct inquiry of this kind could be obtained at the current session. After the Banking and Currency Committee had been intrusted with the general duty of making the inquiry, it was believed by conservatives that something could be done in connection with legislation incidentally to the other duties of the committee. The designation of a subcommittee specifically intrusted with the duty of examining pending bills was a subsequent development and one which had not been looked for. It is now planned by Democratic leaders to have the Glass subcommittee draft a banking bill of its own. Thus is afforded the foundation for a distinct Democratic policy in regard to banking and currency. Should the committee agree upon a bill, the effect would be practically to force upon the leaders of the party the necessity of taking a definite position with reference to banking reform. This position would necessarily have to be explained during the campaign of next summer and autumn; and hence in the event of success at the polls the party would stand committed to action of a distinct type on the general issue. The probable course of development during the next few weeks will be the drafting of the tentative bill by this subcommittee. Then, undoubtedly, hearings will be opened before the subcommittee, and an effort will be made to get the views of banking and other leaders as to the probable working of the proposed bill. It is not likely that any measure of the sort can be passed next

winter, although that would be a possibility should the leaders set themselves the task of compelling its adoption. No statement has as yet been made regarding the probable drift of the bill that is to be prepared, although the expressions of Democratic leaders indicate a strong desire on their part to differentiate the new measure from that prepared by the National Monetary Commission as far as possible. This does not imply that there is any wish to give up the good features of the Monetary Commission measure, but simply a desire to take a fresh start, free of the handicap due to existing prejudices against some of those who were responsible for the commission's work. It will be a good while before any definite developments occur in the committee. Meanwhile one of the most important steps toward some tangible outcome for the current agitation in favor of banking reform has thus been taken.